FILED BY CLERK
JUN 14 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RICARDO OMAR GALINDO, Appellant.	)	2 CA-CR 2009-0365 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090296-001

Honorable Edgar B. Acuña, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Barton & Storts, P.C.
By Brick P. Storts, III
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 After a jury trial, appellant Ricardo Galindo was convicted of aggravated assault of a law enforcement officer with a deadly weapon or dangerous instrument;

second-degree burglary; and unlawful use of a means of transportation. He was sentenced to a combination of concurrent and consecutive terms of imprisonment, all presumptive, totaling fourteen years. On appeal, Galindo argues the trial court committed fundamental error when it instructed the jury on disorderly conduct, as a lesser-included offense of aggravated assault, without giving the jury a definition of the mental state of recklessness. The state responds that Galindo invited any error by proposing the jury instruction used by the court and therefore has forfeited appellate review. The state alternatively argues that Galindo has failed to sustain his burden of establishing that any error of omission was fundamental and prejudicial. For the following reasons, we affirm.

¶2 According to evidence at Galindo's trial, Tucson Police Officer Steven Pupkoff responded to a burglary-in-progress call and observed two men leaving the scene in a stolen vehicle. As Pupkoff activated his emergency lights, Galindo and the other suspect got out of the stolen vehicle and fled on foot. When Pupkoff approached, Galindo pointed a handgun toward the officer. Pupkoff fired at Galindo, wounding him in the knee. Pupkoff's marked patrol car was equipped with a dashboard video camera and a recording of Pupkoff's interaction with Galindo was admitted into evidence.

¶3 At trial, Galindo argued that his conduct did not amount to assault because he had not intended to place Pupkoff in fear of imminent physical injury. He maintained he instead had acted recklessly when he pointed his weapon toward the officer. At Galindo's request, the trial court instructed the jury on the offense of disorderly conduct as a lesser-included offense of aggravated assault, using the following language submitted by Galindo: "A person commits disorderly conduct if, with intent to disturb

the peace and quiet of a neighborhood, family or person, or with knowledge of doing so, such person: Recklessly handles and/or displays a . . . weapon or dangerous instrument." Other instructions given by the court included statutory definitions for the mental states of "intentionally" and "knowingly," but neither Galindo's submitted instruction nor any other jury instruction provided the statutory definition of "recklessly."[1]

¶4 Galindo concedes he failed to object to the omission of such an instruction and therefore has forfeited the right to review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). But, "when a party requests an erroneous instruction, any resulting error is invited and the party waives his right to challenge the instruction on appeal," even for fundamental error. *State v. Logan*, 200 Ariz. 564, ¶¶ 8-9, 30 P.3d 631, 632 (2001) (defendant invited error by submitting theft by control instruction omitting statutory language "without lawful authority"). Although we tend to agree with the state that Galindo invited the error of which he now complains, we need not decide whether he "affirmatively and independently initiated" the omission of an instruction defining the culpable mental state of recklessness, by failing to submit it, or "merely acquiesced" in the omission. *See State v. Lucero*, 223 Ariz. 129, ¶ 31, 220 P.3d 249, 258 (App. 2009) ("[I]f the party complaining on appeal affirmatively and independently initiated the error, he should be

[1]Section 13-105(10)(c), A.R.S., provides:

> "Recklessly" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

barred from raising the error on appeal. If, on the other hand, he merely acquiesced in the error proposed by another, the appropriate sanction should be to limit appellate review to fundamental error."). Galindo has, in any event, failed to sustain his burden of showing fundamental, prejudicial error.

¶5 To prevail on this claim, Galindo was required to establish that error occurred and that the error "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶¶ 23-24, 115 P.3d at 608. He must also establish "that the error in his case caused him prejudice" by showing that, absent the error, the jury "could have reached a different result." *Id*. ¶¶ 20, 26-27

¶6 According to Galindo, the omission of a jury instruction defining the culpable mental state of recklessness constituted fundamental error because "[t]he difference between intentional and reckless conduct was the heart of the matter to be determined by the jury." As an initial matter, we note that "[a] trial court is not required to define every phrase or word used in the instructions, especially when they are used in their ordinary sense and are commonly understood." *State v. Eastlack*, 180 Ariz. 243, 259, 883 P.2d 999, 1015 (1994) (no prejudicial error resulted from failure to define "unlawfully" in arson trial); *see also State v. Smith*, 160 Ariz. 507, 511, 774 P.2d 811, 815 (1989) (trial court not "required sua sponte to define 'knowingly'"); *State v. Barnett*, 142 Ariz. 592, 594-95, 691 P.2d 683, 685-86 (1984) (failure to define "intentionally" in jury instruction not fundamental error). But we recognize the term "recklessly" might require definition in some circumstances. *See, e.g., State v. Ludwig*, 18 S.W.3d 139, 141-143 (Mo. Ct. App. 2000) (reversing conviction where jury required to find recklessness

without statutory definition instruction; common usage "would allow the jury to find defendant guilty . . . if his conduct was no more than carelessness or negligence"). But here, where Galindo expressly argued that he had been reckless, any distinction between common usage and the statutory definition would appear irrelevant. *See Eastlack*, 180 Ariz. at 259, 883 P.2d at 1015 (no definition of "unlawfully" required where "no question relative to the unlawfulness of the arson" arose under facts of case or counsel's closing argument). Accordingly, we doubt any error occurred, much less fundamental error. *Cf. O'Meara v. Gottsfield*, 174 Ariz. 576, 578, 851 P.2d 1375, 1377 (1993) (clarifying omission of definitional instructions in *Smith* and *Barnett*, "[a]side from not amounting to fundamental error . . . was not error at all").

¶7 Moreover, Galindo has not explained how the jury might have reached a different result if it had been provided the statutory definition of recklessness, and so he has developed no argument that the omission was prejudicial. *See Henderson*, 210 Ariz. 561, ¶¶ 26-27, 115 P.3d at 608-09. As the state points out, in finding Galindo guilty of aggravated assault, the jury necessarily found Galindo had acted intentionally, a more culpable mental state than recklessly.[2] *See* A.R.S. § 13-202(C) ("If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly."). The jury thus may not have had any reason to consider the

[2]The trial court instructed the jury pursuant to A.R.S. § 13-1203(A)(1) and (A)(2) that an assault "requires proof that the defendant intentionally, knowingly, or recklessly caused a physical injury to another person or [that] the defendant intentionally placed another person in reasonable apprehension of imminent physical injury." Because there was no evidence that Pupkoff was injured, the jury necessarily found Galindo had intentionally placed Pupkoff in reasonable apprehension of injury. *See* §§ 13-1203(A)(2), 13-1204(A)(2).

meaning of recklessness at all in its deliberations. *See State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996) ("[T]he jury may deliberate on a lesser offense if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge."). Even if the jury here did consider the lesser offense of disorderly conduct after an initial impasse on the charge of aggravated assault, *see id.*, Galindo has suggested no reason application of a common-usage definition of "recklessly," which may be broader than the statutory definition, could have affected the jury's ultimate determination that Galindo acted intentionally.

¶8 Accordingly, Galindo has failed to sustain his burden of establishing the omission was fundamental, prejudicial error. We affirm Galindo's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge